IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEHIGH VALLEY HEALTH NETWORK, ET AL.	:	**CIVIL ACTION**
v.	:	
EXECUTIVE RISK INDEMNITY INC., ET AL.	:	**NO. 1999-cv-5916**

MEMORANDUM AND ORDER

SCHILLER, J. **January 5, 2001**

Plaintiffs Lehigh Valley Health Network and Lehigh Valley Hospital ("Lehigh Valley") brought this action for a declaratory judgment. They ask the court to determine which of the three defendant insurance companies is obligated to provide a defense and indemnification for two lawsuits brought against Lehigh Valley by Dr. Richard J. Angelico. Plaintiffs originally filed this action in the Pennsylvania Court of Common Pleas, and the defendants removed the case to the Eastern District of Pennsylvania basing jurisdiction on diversity of citizenship. The defendants have filed motions for summary judgment, and the case is now ready for decision. Upon review of the briefs and the extensive record in this case, I will grant summary judgment to American Continental Insurance Company ("ACIC") and deny summary judgment to Travelers and Executive Risk Indemnity Corp. ("Executive Risk").

I. Factual History

A. Overview

The defendant insurance companies, ACIC, Travelers (formerly Aetna), and Executive Risk successively provided insurance coverage for "claims made" against Lehigh Valley during each policy's effective period. ACIC issued two Directors and Officers insurance policies covering Lehigh Valley from July 1, 1993 to July 1, 1995. Defendant Travelers Casualty and Surety Company ("Travelers") issued a D&O policy covering the hospital from July 1, 1995 to July 1, 1996. Defendant Executive Risk picked up that policy for the period from July 1, 1996 through July 1, 1999. For the purposes of this memorandum, I will address Executive Risk and Travelers' contentions jointly.[1]

Plaintiffs have sought reimbursement from the defendants for the costs of two lawsuits brought by Dr. Angelico against Lehigh Valley. The first suit was filed in federal court on April 9, 1996 alleging antitrust and civil rights violations, as well as breach of contract actions against Lehigh Valley and other health care providers in Northeastern Pennsylvania. Dr. Angelico brought a second suit against the hospital in the Court of Common Pleas for Lehigh County on September 17, 1999. Dr. Angelico's suits followed litigation between Dr. Toonder and Lehigh Valley over a manpower slot at Lehigh Valley Hospital.

Plaintiff maintains that it was continuously covered by insurance throughout the history of this litigation and is therefore entitled to compensation from one or all defendants. Both Travelers and ACIC dispute coverage. Although Dr. Angelico initiated his suits during the period when Travelers' policy was in force, Travelers argues that the Angelico claims first

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1. At a status conference on September 7, 2000, Ms. Ventrel, counsel for both Executive Risk and Travelers, represented to this court that if either Executive Risk or Travelers is found to be liable, Travelers would indemnify and provide for Lehigh Valley Health Network's defense in both of Dr. Angelico's lawsuits.

"arose" with the Toonder litigation. Therefore, the Angelico litigation would not be covered by Travelers' contract with the hospital. Travelers also asserts that coverage is barred under a policy exclusion for any claims which arise from litigation that predates the Traveler's policy. ACIC, the hospital's previous insurance provider, disclaims liability because the two Angelico suits were filed after its policy with the hospital expired in July 1995.

Because much of the instant insurance contract dispute revolves around the litigation in the Toonder and Angelico cases, the history of those claims merits close examination. I will draw upon various complaints, memoranda, opinions, and other documents drafted in the course of the Toonder and Angelico lawsuits which have been submitted by the instant parties as part of the record this case. Nothing I write below is intended to influence the outcome of the ongoing litigation between Dr. Angelico and Lehigh Valley Hospital.

B. The Toonder Litigation

In March 1994, Dr. Geoffery Toonder brought an action against Lehigh Valley Hospital. *See Toonder v. Lehigh Valley Hosp., Inc*., No. 94-E-18 (Pa. Ct. Common Pleas, Lehigh County March 18, 1994). Because this suit unquestionably arose during ACIC's policy period, it provided coverage for Toonder's first suit.

According to the complaint in that case, Dr. Toonder was a cardiothoracic surgeon with privileges to perform surgery at Lehigh Valley Hospital. The hospital created "manpower slots" for each specialty and sub-specialty. After a surgeon left Dr. Toonder's practice, he sought and obtained an additional manpower slot at Lehigh Valley. Dr. Toonder recruited Dr. Villars and presented his credentials to the appropriate hospital review committee. In February 1994, Dr. Toonder was informed that his manpower slot had been rescinded by the medical staff

committee. He then sued to compel Lehigh Valley to consider his candidate for a manpower slot.

The hospital and Dr. Toonder entered into a settlement agreement. Under its terms, the hospital again provided Dr. Toonder with a manpower slot, and Dr. Toonder was to submit a candidate within nine months. Any application was to be given 'fair consideration' and treated as any other application for medical staff privileges.

Pursuant to their agreement, Dr. Toonder advanced Dr. Richard Angelico as a candidate for the open manpower slot on November 6, 1994. Dr. Angelico previously held active privileges at Lehigh Valley Hospital. With Dr. Angelico in his practice, Dr. Toonder could have met the yearly minimum requirement for surgeries imposed by Lehigh Valley Hospital. However, several meetings of the hospital committee convened without considering Dr. Angelico's application. The prolonged delay prompted Dr. Toonder to file a petition to enforce the settlement agreement on March 21, 1995. The court denied his petition. *See Toonder v. Lehigh Valley Hosp.*, No. 94-E-18, at 15-16 (Pa. Ct. Common Pleas July 1, 1996) (slip op.).[2]

ACIC provided coverage for the initial complaint in the Toonder litigation and the subsequent petition to enforce the settlement. Lehigh Valley Hospital's insurance policy with ACIC expired on July 1, 1995. Lehigh Valley Hospital purchased a policy with Traveler's with an effective start date of July 1, 1995.

C. The Angelico Litigation

Dr. Angelico filed his own action on April 9, 1996, naming as defendants Lehigh Valley Hospital, St. Luke's Hospital, Lehigh Valley's lawyers in the *Toonder* action, and Panebianco-

2. The court also addressed Dr. Toonder's claim that the revocation of Dr. Angelico's courtesy privileges improperly prejudiced Dr. Angelico's application.

Yip Heart Surgeons, Bethlehem Cardiothoracic Surgical Associates ("BCSA"). *See* Complaint, *Angelico v. Lehigh Valley Hosp., Inc.*, No. 96-CV-2861 (E.D. Pa. Apr. 9, 1996). The latter two defendants are surgical groups with concentrations in heart surgery who practice in Lehigh Valley. Dr. Angelico alleged that Lehigh Valley, St. Luke's Hosptial, BCSA, and Panebianco-Yip Heart Surgeons, conspired to exclude him from the cardiothoracic surgical market in the Lehigh Valley area.[3] Dr. Angelico specifically stated in his complaint in federal court that he was not a party to the Toonder litigation.

Lehigh Valley subpoenaed his records from St. Luke's in the *Toonder* suit, and evidence from that proceeding was presented to Lehigh Valley's Executive Committee on June 6, 1995. The committee rejected Dr. Angelico's application. On September 30, 1995, Dr. Angelico appealed to a committee of the hospital's Board of Trustees, under the hospital's Fair Hearing and Appellate Review Process. Pennsylvania law requires such a process provide a fair hearing at which a physician denied privileges can call and cross-examine witnesses and present evidence. *See* 28 PA. CODE §107.1(24). The board relied on evidence discovered during the Toonder litigation and affirmed the denial of privileges. Lehigh Valley then submitted a report to the National Practitioner's Data Bank, indicating that it had determined that Dr. Angelico had engaged in unprofessional and disruptive conduct and failed to demonstrate an ability to work with others.

On April 9, 1996, Dr. Angelico sued Easton, Lehigh Valley and St. Luke's Hospitals for antitrust violations; Lehigh Valley and its lawyers for civil rights violations for abuse of the

3. The Lehigh Valley, as described in the complaint, is located in Northeastern Pennsylvania and centers around Lehigh and Northampton Counties.

subpoena process; Lehigh Valley for breach of contract (he alleged the hospital's by-laws constituted a contract); and St. Luke's for breach of contract and interference with prospective contractual relations. Judge Joyner of this court granted summary judgment and dismissed the case, *see Angelico v. Lehigh Valley Hosp., Inc.,* 984 F. Supp. 308 (E.D. Pa. 1997), and the Third Circuit reversed in part. *See Angelico v. Lehigh Valley Hosp., Inc*., 184 F.3d 268 (3d Cir. 1999). The federal court action is ongoing.

Dr. Angelico also filed a complaint on September 17, 1997 in the Court of Common Pleas for Lehigh County naming Lehigh Valley Hospital as the sole defendant, in which he raised many of the same allegations as he did in his federal complaint. The trial court dismissed Dr. Angelico's claims because it found disposition of Dr. Toonder's suit collaterally estopped Dr. Angelico's state court claim. *See Angelico v. Lehigh Valley Hosp., Inc.*, No. 97-C-1671 (Pa. Ct. Common Pleas) (slip op.). The Pennsylvania Commonwealth Court reversed, finding collateral estoppel did not bar Dr. Angelico's claims because his fair hearing did not occur until after the litigation had concluded. *See Angelico v. Lehigh Valley Hosp., Inc*., No. 1802 C.D.1999, at 10-11 (Pa. Commw. Ct. May 25, 2000) (slip op.).[4] Notably, the Commonwealth Court left unanswered whether Dr. Toonder and Dr. Angelico were in privity based on their agreement to form a partnership at a later date. *See id.* at 10. The record in the case before this court reflects nothing further about the state court action.[5]

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4. Collateral estoppel, also known as issue preclusion, forecloses re-litigation of factual or legal issues which were actually litigated and necessary to the judgment in a prior action involving the same party or its privies. *See Yonkers v. Donora Borough*, 702 A.2d 618 (Pa. Commw Ct. 1997) (cited by the Commonwealth Court in *Angelico*).

5. Counsel for Travelers notes that Dr. Angelico filed another action against St. Luke's hospital in state court on May 11, 1995. *See* Complaint, *Angelico v. St. Luke's Hosp.*, No. 95-C-1107

D. Lehigh Valley Hospital's Insurance Coverage

Lehigh Valley Hospital carried liability insurance coverage throughout the history of the Toonder and Angelico suits. It first purchased a policy with ACIC, and switched to Travelers in 1995.

1. The ACIC Policy

ACIC insured the instant plaintiff, Lehigh Valley Hospital, from July 1, 1993 through July 1, 1995 under a Directors and Officers liability insurance policy. Dr. Toonder filed his lawsuit in March 1994, during ACIC's policy period, and ACIC paid for the entirety of the Toonder litigation, including Lehigh Valley's defense of Dr. Toonder's petition to enforce the settlement agreement in March 1995.

The ACIC policy provides that ACIC will "pay on behalf of the Insured Entity Loss from *Claims first made against it during the policy period*." ACIC Policy, Section I(A). The policy defines a claim as follows:

> (A) Claim means (1) written notice received by an insured that any person or entity intends to hold any insured responsible for a Wrongful Act, or (2) a legal, injunctive or administrative proceeding against an Insured Person solely by reason of his or her status as such;
> (B) A Claim shall be deemed made when ACIC is notified or when such Claim is first made or asserted against an Insured, whichever occurs first.

ACIC Policy, Section II (A-B). Section V of the policy, titled "LIMIT OF LIABILITY" in large capital letters, provides that:

> [A]ll claims based on, arising out of, directly or indirectly resulting from, in

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(Pa. Ct. of Common Pleas, filed May 11, 1995). However, given that the St. Luke's Litigation involved neither the same plaintiff nor the same defendant as the Toonder litigation. The St. Luke's case is not relevant to an insurance policy exclusion for prior claims made against Lehigh Valley.

> consequence of, or in any way involving the same or related facts, circumstances, situations, transactions, or events shall be deemed to be a single claim made at the time the earliest claim is made.

ACIC Policy, Section V(B).

2. The Travelers Policy

In 1995, Lehigh Valley opted not to renew its ACIC contract, and purchased a policy with Aetna (now Travelers) for the period from July 1, 1995 to July 1, 1996. Executive Risk picked up the policy through July 1999. The Travelers' policy contained wording virtually identical to ACIC's policy regarding coverage for claims made during the policy period. Its limitation contained only one variant sentence, which I have italicized below:

> [A]ll claims based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving the same or related facts, circumstances, situations, transactions, or events shall be deeded to be a single claim made at the time the earliest claim is made. *A claim shall be deemed made when Aetna [now Travelers] is notified... or when such claim is first made or asserted against an insured, whichever occurs first.*"

Travelers Policy, Section IV(C)(2) (emphasis added to variant portion). The Travelers policy also contained an exclusion for all claims:

> based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any fact, circumstance, or situation (a) underlying or alleged in any prior and/or pending litigation as of the Inception date [of the policy], or (b) which has been the subject of any notice given before the Inception Date under any policy of insurance.

Travelers Policy, Section III (B)(4). The succeeding policies supplied by Executive Risk contained identical provisions.

Part of the application for insurance coverage required Lehigh Valley to list all claims "such as would fall within the scope of the proposed insurance." A handwritten response on the

application responds, "Do not need to complete." Another question asked Lehigh Valley to list "any fact, circumstance or situation which [Lehigh Valley had] reason to suppose might afford valid grounds for any claims as would fall within the scope of the proposed insurance." Again, "Do not need to complete" was scrawled on the page. It is unclear whether an agent of Travelers or Lehigh Valley wrote these words. What is clear is that the record reflects no further attempt by Travelers to learn about prior or potential claims against Lehigh Valley, despite this court's specific request for Travelers to provide such information.

Dr. Angelico filed his first lawsuit, the federal court action, on April 9, 1996, during the life of the Travelers' policy. His second action, in state court, followed on September 17, 1997, by which time Executive Risk had succeeded to Travelers' coverage of Lehigh Valley.

E. Origin of the Instant Dispute and Procedural History

Plaintiff Lehigh Valley notified Travelers and Executive Risk of the federal court action by Dr. Angelico on April 12, 1996. However, Travelers denied coverage, claiming that the Angelico claims first arose during the Toonder litigation. It also cited its prior litigation exclusion. Plaintiff then sought reimbursement from ACIC, but ACIC denied coverage because the Angelico claims were made after its policy had expired.

Originally, Lehigh Valley filed this declaratory action in state court, seeking a determination of which (if any) of its insurance providers is responsible for the ongoing Angelico litigation. ACIC and Travelers removed the action to this court. The case was first assigned to Judge Yohn, who recommended that the parties file cross motions for summary judgment. ACIC and Travelers did so, and each of the parties have submitted extensive briefs. The case was transferred to me, and I held a status conference which gave the parties an opportunity to argue

the instant motions. I ordered subsequent briefing by the parties, and the case is now ready for decision.

II. Discussion

A. Summary Judgment Standard

A motion for summary judgment shall be granted where, after consideration of the evidence in the light most favorable to the nonmoving party, "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247 (1986). The non-moving party bears the initial burden of pointing to those portions of the record which show an absence of genuine issues of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Even where the non-movant has not opposed a motion for summary judgment,[6] this court has an obligation to independently determine whether the movant has a right to judgment as a matter of law. LOCAL R. CIV. P. 7.1; *Home Ins. Co. v. Law Offices of Jonathan Young, P.C.* 32 F.Supp.2d 219, 223 (E.D. Pa. 1998).

B. Contract Interpretation in Pennsylvania

In the instant dispute, none of the facts are in contention. The only question is one of interpretation of the ACIC and Travelers policies as they apply to the Angelico claims, which is a matter of law. *See Township of Center v. First Mercury Syndicate, Inc*., 117 F.3d 115, 117 (3d Cir. 1997). Although the parties have not briefed the issue, I conclude that Pennsylvania law governs the instant dispute. *See Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742,

6. Travelers has repeatedly claimed that all or part of its motion for summary judgment is unopposed.

746 (3rd Cir. 1999); *Travelers Indem. Co. v. Fantozzi ex rel. Fantozzi*, 825 F. Supp. 80, 84 (E.D.Pa.1993).

Under Pennsylvania law, insurance contracts should be construed by the court rather than by the jury. *See Madison Constr. Co. v. Harleysville Mutual Ins. Co.*, 735 A.2d 100, 106 (Pa. 1999); *Home Ins. Co.*, 32 F. Supp.2d at 223. Courts should interpret insurance contracts in a manner that best implements the intent of the parties. *See Standard Venetian Blind Co. v. American Empire Ins. Co.*, 469 A.2d 563, 566 (Pa. 1983). Where the contract is plain and unambiguous, the parties' intent is best conveyed by the plain and ordinary meaning of the contractual language. *See Madison Constr. Co.,* 735 A.2d at 106; *Standard Venetian* at 566; *Home Ins. Co.*, 32 F. Supp.2d at 223.

However, if a contract provision is ambiguous, the provision must be construed against the insurer who drafted the contract and in favor of the insured. *See Madison Constr. Co.,* 735 A.2d at 106; *Standard Venetian Blind*, 469 A.2d at 566. In particular, where an insurer relies on a policy exclusion as the basis for the denial of coverage, it has asserted an affirmative defense and the insurer must show the policy exclusion precludes coverage. *See Home Ins. Co.*, 32 F. Supp. 2d at 224. Accordingly, the insurer bears the burden of proof on that issue. *See Madison Constr. Co.*, 735 A.2d at 106. A provision is ambiguous if it is subject to more than one reasonable interpretation when applied to a particular set of facts. *See Madison Constr. Co.*, 735 A.2d at 106. However, the court should avoid straining contract language to create ambiguities. *See id.*

Reasonable expectation doctrine provides a second exception to the Pennsylvania plain meaning rule in interpreting insurance contracts. *Bowersox Truck Sales & Serv. v. Harco Nat'l*

Ins. Co., 209 F.3d 273, 278-79 (3d Cir. 2000); *Medical Protective Co. v. Watkins*, 198 F.3d 100, 106 (3d Cir. 2000); *Bensalem Township v. Int'l Surplus Lines Ins. Co.*, 38 F.3d 1303, 1309-11 (3d Cir. 1994) (citing *Tonkovic v. State Farm Mut. Ins. Co.*, 521 A.2d 920, 925 (1987)). Under the doctrine, the reasonable expectation of the insured, examined in light of the totality of circumstances behind the insurance transaction, *Bowersox Truck Sales*, 209 F.3d at 278-79 will defeat even the unambiguous terms of an insurance contract in at least three situations: (1) where the insurer has made a unilateral change in a policy; (2) the insured received something other than what it thought it purchased; and (3) the insurer or its agent actively provided misinformation about coverage not supported by the language of the policy. *Highlands Ins. Group v. Van Buskirk*, Civ. A. No. 98-CV-4847, 2000 U.S. Dist. LEXIS 16008, at *14 (E.D. Pa. Oct. 31, 2000) (J.M. Kelly, J.).

C. Claims Made Insurance Policies

The contracts at issue here are "claims made" insurance contracts, which differ from "occurrence" policies. Occurrence policies indemnify the insured against all claims stemming from an act committed by the insured during the relevant policy period, no matter when the claim is actually filed. *See Home Ins. Co.*, 32 F. Supp. at 224. In contrast, a claims made policy provides coverage for the insured only for claims by persons and other entities first asserted against the insured during the policy period. *See Township of Center*, 117 F.3d at 118. For the purposes of determining coverage under a claims made policy, a "claim" is a demand for something as a right. *See Bensalem Township v. Western World Ins. Co.*, 609 F. Supp. 1343, 1348 (E.D. Pa. 1985). Because exposure ends at a fixed point in claims made policies, underwriters may more accurately predict an insurer's potential liability; the decreased risk

allows the insurance companies to supply claims made policies at a lower price to consumers. *See Am. Cas. Co. of Reading v. Continisio*, 17 F.3d 62, 68 (3d Cir. 1994)(citing *Zuckerman v. Nat'l Union Fire Ins. Co.*, 495 A.2d 395, 398, 406 (N.J. 1985));*U.S. v. Strip* , 868 F.2d 181, 187 (6th Cir. 1989).[7]

D. Application

As I have noted above, both ACIC and Travelers assert that the Angelico federal and state suits constitute claims not covered by their respective policies. However, an examination of both contract language and public policy show that only ACIC can successfully avoid coverage as a matter of law. In contrast, Travelers has not sufficiently shown the absence of a genuine issue of material fact as to Lehigh Valley's entitlements under its policy.

1. ACIC

ACIC bears no responsibility to Lehigh Valley for the Angelico litigation because Dr. Angelico first brought his claims after the expiration of ACIC's policy on July 1, 1995. ACIC's contract specifically states that it will pay for claims first made against Lehigh Valley "during the Policy period." As applied to the facts here, there is no ambiguity in that language: the first Angelico lawsuit was not filed until April 9, 1996, more than nine months after ACIC's policy terminated. There is no proof in the record that Dr. Angelico gave written notice to Lehigh Valley of his intent to hold them responsible during the ACIC policy period.

The plaintiff and Travelers maintain the Angelico claims actually arose during the ACIC

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7. An insured may extend the time within which a claim can be reported after the expiration of a claims made policy by purchasing "tail coverage." *See Home Ins. Co.*, 32 F.Supp. 2d at 224. Tail coverage will insure the policy holder for claims asserted during the life of the tail policy for acts and omissions that occurred during the life of the original claims made policy. *See id.*

policy period because the Angelico suits are related to the Toonder suit. To that end, they point to ACIC's related claims clause, which provides that a claim involving facts related to an earlier suit is deemed to constitute a single claim. *See* ACIC Policy Section V(B). Hence, they argue, the Angelico suit should be deemed to have arisen during with either Dr. Toonder's complaint in 1994 or his petition to enforce the settlement in 1995.

As discussed above, the related claims provision appears under the caption "LIMIT OF LIABILITY," in plainly visible capital letters. This policy *exclusion* cannot be used to *expand* the scope of one insurance company's liability to the benefit of another company. Furthermore, the Toonder and Angelico suits involve different plaintiffs, attenuating any reasonable connection between the suits.

The court is also troubled by plaintiff's argument because it uses a related claims exclusion to transform a standard claims made policy into a contract for tail coverage. A claims made policy decreases the risk to the insurer and the cost to the insured by setting a fixed end to the exposure period. An insured may increase the time to report claims by purchasing tail coverage. Under the proposed reading of the related claims exclusion, Lehigh Valley could demand coverage for claims long after the close of the ACIC policy by establishing a relationship to a claim made during the ACIC policy period. That would defeat the cost conscious protection which a claims made policy is meant to provide. If Lehigh Valley wished protection for subsequent claims for actions it took during the ACIC Policy period, it could have purchased tail coverage.

In sum, the Angelico suits never came within the ambit of coverage of the ACIC policy and ACIC is entitled to judgment as a matter of law.

2. Travelers

Unlike ACIC, Travelers does not assert that the Angelico suits never came within the scope of its insurance policy with Lehigh Valley. Clearly, the claims were filed within the time frame covered by the Travelers and Executive Risk policies. Rather, Travelers asserts that two exclusions in its policies — one for related claims and another for prior litigation — preclude liability. The prior claims exclusion disclaims coverage for all claims:

> based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any fact, circumstance, or situation (a) underlying or alleged in any prior and/or pending litigation as of the Inception date [of the policy], or (b) which has been the subject of any notice given before the Inception Date under any policy of insurance.

Travelers Policy, Section III(B)(4). The related claims provision operates in a similar fashion:

> [A]ll claims based on, arising out of, directly or indirectly resulting from, in consequence of, or in any may involving the same or related facts, circumstances, situations, transactions, or events shall be deeded to be a single claim made at the time the earliest claim is made. A claim shall be deemed made when Aetna [now travelers] is notified... or when such claim is first made or asserted against an insured, whichever occurs first.

Travelers Policy, Section IV(C)(2).

Because Travelers relies on policy exclusions, Travelers asserts an affirmative defense and bears the burden of showing that the exclusions preclude coverage. *See Madison Constr. Co.*, 735 A.2d at 106; *Home Ins. Co.*, 32 F. Supp. 2d at 224. Travelers' main argument is that the prior claims and related claims exclusions preclude coverage because the Toonder and Angelico suits are factually related.

However, I find that the exclusions, as applied to the facts here, are ambiguous and should be construed against their drafter, Travelers. *See Continental Ins. Co. v. Davis*, 56 F.

Supp. 2d 513, 517 (E.D. Pa. 1999). Travelers' interpretation of the policy it drafted casts too wide a net and captures too many claims in its exclusion. As counsel for Travelers admitted to this court at the status conference, there must be some reasonable limitation to the succession of claims which could be excluded under the Travelers policy. Courts have already noted the word 'related' does not encompass every conceivable logical relationship. "A relationship between two claims might be so attenuated or unusual that an objectively reasonable insured could not have expected that they would be treated as a single claim under the policy." *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.*, 855 P.2d 1263, 1274 (Cal. 1993); *American Commerce Ins. Brokers, Inc. v. Minnesota Mutual Fire & Casualty Co.*, 551 N.W.2d 224, 228 (Minn. 1996); *see also Checkrite Ltd., Inc. v. Illinois Nat'l Ins. Co.*, 95 F. Supp.2d 180,190 (S.D. N.Y. 2000) (finding claim by new class of plaintiffs who joined ongoing class action suit alleging similar harm constituted separate claim within meaning of prior litigation exclusion in claims made policy).

Thus, I find that the Angelico and Toonder suits are too dissimilar and the nexus between them too attenuated for coverage to be barred as related to a prior claim or litigation. Although there is a modicum of overlap between the two suits, their connection is too attenuated to constitute a single claim. The Toonder suit, which predates the Travelers policy, was brought by a different plaintiff. Dr. Toonder's original complaint did not even mention Dr. Angelico. Toonder sued Lehigh Valley because of his inability to meet the hospital's surgery quota without filling the manpower slot granted to him. While the petition to enforce the settlement agreement did mention Dr. Angelico, what governs is the initial claim brought by Dr. Toonder's suit and not later developments in the lawsuit. *See id.* at 190-91 (distinguishing between claim and suit for

purposes of a claims made policy).

Dr. Angelico's claims are distinctive. He entered the litigation only after a long confrontation of his own with the health care providers in the Lehigh Valley area. His federal court suit sounds broadly, claiming that several local health care providers conspired to keep him out of the market. While he also had one civil rights claim for abuse of the subpoena process in Lehigh Valley, that claim alleged a specific injury to Dr. Angelico because the subpoenas allowed damaging information to be collected about Dr. Angelico.[8]

Similarly, Dr. Angelico's state court suit alleged the denial of a fair hearing for his application for the manpower slot. Again, this is a direct injury to Dr. Angelico. Although Dr. Toonder was also harmed by the handling of Dr. Angelico's application, Travelers has not established that Dr. Toonder and Dr. Angelico were in privity to such a degree that adjudication of injury against one may be used to collaterally estop the other. Indeed, the Commonwealth Court deliberately avoided deciding this issue in connection with Dr. Angelico's state court claim. *See Angelico v. Lehigh Valley Hosp., Inc*., No. 1802 C.D.1999, at 10 (Pa. Commw. Ct. May 25, 2000) (slip op.). By extension, I hold that the Toonder and Angelico claims differ to a sufficient degree that they are not reasonably related to preclude coverage.

In addition, to deny Lehigh Valley coverage would strip it of coverage it reasonably expected under the policy. As the plaintiff has reiterated at several points during these

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8. I also find no merit in Travelers' argument that the Third Circuit has held that the Angelico claims arose out of the Toonder claims within the meaning of the policy exclusions. *See Angelico v. Lehigh Valley Hosp*., 184 F.3d 268, 277 (3d Cir. 1999) ("[Angelico's section 1983] claim arises out of the litigation of a related state court suit that was resolved during the course of this litigation."). The Third Circuit's comment was nothing more than a passing description of Dr. Angelico's civil rights claim and was not intended as a conclusion of law. Indeed, the issue of Traveler's policy exclusions was not even before the court.

proceedings, it was continually covered through the history of the Toonder and Angelico disputes. Lehigh Valley could reasonably have expected that one or the other of its policy providers to insure it for a claim brought during those policy periods. Furthermore, Travelers had the opportunity to inquire into past and potential claims against Lehigh Valley but passed on its chance to do so. The insurance application form which Lehigh Valley completed requested the hospital to list all prior claims against it. Those questions were crossed off. Though this court asked Travelers to do so, it has not been able to show any documentation listing the Angelico dispute as a "prior claim." In addition, at the time Travelers initiated its policy, the dispute with Dr. Angelico was approaching its climax. I find that it is reasonable for Lehigh Valley to expect that its insurance carrier would cover claims resulting from a dispute which was ongoing and pregnant with the threat of litigation at the very inception of the policy.

Accordingly, as the moving party and as the party with the burden of proof, Travelers has not shown the absence of a genuine issue of material fact and is not entitled to judgment as a matter of law. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEHIGH VALLEY HEALTH NETWORK, ET AL.	:	**CIVIL ACTION**
v.	:	
EXECUTIVE RISK INDEMNITY INC., ET AL.	:	**NO. 1999-cv-5916**

ORDER

AND NOW, this day of January, 2001, upon consideration of the defendants' cross motions for summary judgment, the plaintiff's responses thereto, subsequent briefing by the parties, it is hereby **ORDERED** that:

(1) Defendant American Continental Insurance Company's motion for summary judgment (docket no. 12-1) is**GRANTED** . Plaintiff Lehigh Valley's claim against American Continental is **DISMISSED**;

(2) The joint motion for summary judgment of defendant Travelers Casualty and Surety Company and defendant Executive Risk Indemnity Inc. (docket no. 11-1) is **DENIED**;

(3) Defendant Travelers' request for judicial notice is **GRANTED**; the court has considered the Court of Common Pleas decision in the Angelico state court action;

(4) Defendant American Continental Insurance Company's request for judicial notice is **GRANTED**; the court has considered the Commonwealth Court decision in the Angelico state court action.

BY THE COURT:

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Berle M. Schiller, J.